

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ROBERT G. LOPEZ,

Plaintiff,

- against -

BONANZA.COM, INC. et al,

Defendants.  
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Case No. 17 CV 8493

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: **ANSWER TO FOURTH**  
: **AMENDED COMPLAINT WITH**  
: **AFFIRMATIVE DEFENSES**  
: **AND COUNTERCLAIMS**  
:  
: **DEMAND FOR JURY TRIAL**

Defendant BONANZA.COM, INC. (collectively, “Defendant” or “Counter-Plaintiff”) by their attorneys, WILSON, ELSEER, MOSKOWITZ, EDELMAN & DICKER LLP, as and for its answer to the Third Amended Complaint (“Complaint”) of plaintiff ROBERT G. LOPEZ (“Plaintiff” or “Counter-Defendant”), in the above captioned action, allege upon information and belief as follows:

**NATURE OF ACTION**

1. Defendant denies the allegations contained in paragraph 1 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the Complaint with respect to the other named co-defendants.

2. Paragraph 2 of the Complaint sets forth legal conclusions to which no response is required, but to the extent a response is required, Defendant admits that the Court has subject matter jurisdiction over the federal claims and refer all questions of law to the Court.

3. Defendant denies the allegations contained in paragraph 3 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to

the allegations contained in paragraph 3 of the Complaint with respect to the other named co-defendants.

4. Defendant denies the allegations contained in paragraph 4 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4 of the Complaint with respect to the other named co-defendants.

### **THE PARTIES**

5. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the Complaint.

6. Defendant admits that BONANZA.COM, INC. is a Washington corporation with and office located at 400 East Pine Street, Seattle, Washington 98122 as alleged in paragraph 6 of the Complaint. Defendant denies all other allegations contained in paragraph 6 of the Complaint.

7. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7 of the Complaint.

8. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 of the Complaint.

9. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 of the Complaint.

10. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 of the Complaint.

11. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 of the Complaint.

12. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 of the Complaint.

13. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 of the Complaint.

14. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 of the Complaint.

15. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15 of the Complaint.

16. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 of the Complaint.

17. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17 of the Complaint.

18. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 18 of the Complaint.

19. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 19 of the Complaint.

20. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 20 of the Complaint.

21. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21 of the Complaint.

22. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22 of the Complaint.

23. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 23 of the Complaint.

24. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 24 of the Complaint.

25. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 25 of the Complaint.

26. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 26 of the Complaint.

27. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 27 of the Complaint.

28. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 28 of the Complaint.

29. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 29 of the Complaint.

30. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 30 of the Complaint.

31. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 31 of the Complaint.

32. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 32 of the Complaint.

33. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 33 of the Complaint.

34. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 34 of the Complaint.

35. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 35 of the Complaint.

36. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 36 of the Complaint.

37. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 37 of the Complaint.

38. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 38 of the Complaint.

39. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 39 of the Complaint.

40. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 40 of the Complaint.

41. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 41 of the Complaint.

### **FACTS**

42. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 42 of the Complaint.

43. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 43 of the Complaint.

44. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 44 of the Complaint.

45. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 45 of the Complaint.

46. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 46 of the Complaint.

47. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 47 of the Complaint.

48. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 48 of the Complaint.

49. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 49 of the Complaint.

50. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 50 of the Complaint.

51. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 51 of the Complaint.

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56. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 56 of the Complaint.

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59. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 59 of the Complaint.

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63. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 63 of the Complaint.

64. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 64 of the Complaint.

65. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 65 of the Complaint.

66. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 66 of the Complaint.

67. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 67 of the Complaint.

68. Defendant denies the allegations contained in paragraph 68 of the Complaint, except to admit that Defendant is an ecommerce vendor that allows users to sell products through its platform.

69. Defendant denies the allegations contained in paragraph 69 of the Complaint.

70. Defendant denies the allegations contained in paragraph 70 of the Complaint.

71. Defendant denies the allegations contained in paragraph 71 of the Complaint.

72. Defendant denies the allegations contained in paragraph 72 of the Complaint.

73. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 73 of the Complaint.

74. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 74 of the Complaint.

75. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 75 of the Complaint.

76. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 76 of the Complaint.

77. Defendant denies the allegations contained in paragraph 77 of the Complaint.

78. Defendant denies the allegations contained in paragraph 78 of the Complaint, and refers all questions of law to this Honorable Court.

79. Defendant denies the allegations contained in paragraph 79 of the Complaint, except to admit that Plaintiff provided Defendant with an Infringement Notice on February 22, 2018 at 8:40pm. *See* February Correspondence with Plaintiff annexed hereto as Exhibit A.



Defendant responded to the Infringement Notice on February 23, 2018 at 6:32am, and had removed the allegedly infringing goods by February 23, 2018 at 11:24am. *Id.* Defendant therefore denies that it “failed to act expeditiously in removing the infringing content as requested by Plaintiff” as alleged in paragraph 79 of the Complaint. Notably, Plaintiff filed his Third Amended Complaint naming Defendant on February 23, 2018—less than 24 hours after sending his Infringement Notice and subsequent to Defendant’s response and removal of the allegedly infringing goods.

80. Defendant denies the allegations contained in paragraph 80 of the Complaint as phrased.

81. Defendant denies the allegations contained in paragraph 81 of the Complaint as phrased.

82. Defendant denies the allegations contained in paragraph 82 of the Complaint.

83. Defendant denies the allegations contained in paragraph 83 of the Complaint, and refers all questions of law to this Honorable Court.

84. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 84 of the Complaint.

85. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 85 of the Complaint.

86. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 86 of the Complaint.

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294. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 294 of the Complaint.

295. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 295 of the Complaint.

296. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 296 of the Complaint.

297. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 297 of the Complaint.

298. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 298 of the Complaint.

299. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 299 of the Complaint.

300. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 300 of the Complaint.

301. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 301 of the Complaint.

302. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 302 of the Complaint.

303. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 303 of the Complaint.

304. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 304 of the Complaint.

305. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 305 of the Complaint.

306. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 306 of the Complaint.

307. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 307 of the Complaint.

308. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 308 of the Complaint.

309. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 309 of the Complaint.

310. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 310 of the Complaint.

311. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 311 of the Complaint.

312. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 312 of the Complaint.

313. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 313 of the Complaint.

314. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 314 of the Complaint.

315. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 315 of the Complaint.

316. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 316 of the Complaint.

317. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 317 of the Complaint.

318. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 318 of the Complaint.

319. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 319 of the Complaint.

320. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 320 of the Complaint.

321. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 321 of the Complaint.

322. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 322 of the Complaint.

323. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 323 of the Complaint.

324. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 324 of the Complaint.

325. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 325 of the Complaint.

326. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 326 of the Complaint.

327. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 327 of the Complaint.

328. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 328 of the Complaint.

329. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 329 of the Complaint.

330. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 330 of the Complaint.

331. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 331 of the Complaint.

332. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 332 of the Complaint.

333. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 333 of the Complaint.

334. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 334 of the Complaint.

335. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 335 of the Complaint.

336. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 336 of the Complaint.

337. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 337 of the Complaint.

338. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 338 of the Complaint.

339. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 339 of the Complaint.

340. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 340 of the Complaint.



341. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 341 of the Complaint.

342. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 342 of the Complaint.

343. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 343 of the Complaint.

344. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 344 of the Complaint.

345. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 345 of the Complaint.

346. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 346 of the Complaint.

347. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 347 of the Complaint.

348. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 348 of the Complaint.

349. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 349 of the Complaint.

350. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 350 of the Complaint.

351. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 351 of the Complaint.

352. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 352 of the Complaint.

353. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 353 of the Complaint.

354. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 354 of the Complaint.

355. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 355 of the Complaint.

356. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 356 of the Complaint.

357. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 357 of the Complaint.

358. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 358 of the Complaint.

359. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 359 of the Complaint.

360. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 360 of the Complaint.

361. Defendant denies the allegations contained in paragraph 361 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 361 of the Complaint with respect to the other named co-defendants.

362. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 362 of the Complaint.

363. Defendant denies the allegations contained in paragraph 363 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 363 of the Complaint with respect to the other named co-defendants.

**ANSWERING FIRST CAUSE OF ACTION**

364. Defendant repeats and incorporates by this reference its responses to paragraphs 1 through 363 of the Complaint as if fully set forth herein.

365. Defendant denies the allegations contained in paragraph 365 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 365 of the Complaint with respect to the other named co-defendants.

**ANSWERING SECOND CAUSE OF ACTION**

366. Defendant repeats and incorporates by this reference its responses to paragraphs 1 through 365 of the Complaint as if fully set forth herein.

367. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 367 of the Complaint.

368. Defendant denies the allegations contained in paragraph 368 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 368 of the Complaint with respect to the other named co-defendants.

369. Defendant denies the allegations contained in paragraph 369 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 369 of the Complaint with respect to the other named co-defendants.

370. Defendant denies the allegations contained in paragraph 370 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 370 of the Complaint with respect to the other named co-defendants.

**ANSWERING THIRD CAUSE OF ACTION**

371. Defendant repeats and incorporates by this reference its responses to paragraphs 1 through 370 of the Complaint as if fully set forth herein.

372. Defendant denies the allegations contained in paragraph 372 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 372 of the Complaint with respect to the other named co-defendants.

373. Defendant denies the allegations contained in paragraph 373 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 373 of the Complaint with respect to the other named co-defendants.

374. Defendant denies the allegations contained in paragraph 374 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 374 of the Complaint with respect to the other named co-defendants.

375. Defendant denies the allegations contained in paragraph 375 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 375 of the Complaint with respect to the other named co-defendants.

**ANSWERING FOURTH CAUSE OF ACTION**

376. Defendant repeats and incorporates by this reference its responses to paragraphs 1 through 375 of the Complaint as if fully set forth herein.

377. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 377 of the Complaint.

378. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 378 of the Complaint.

379. Defendant denies the allegations contained in paragraph 379 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 379 of the Complaint with respect to the other named co-defendants.

380. Defendant denies the allegations contained in paragraph 380 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 380 of the Complaint with respect to the other named co-defendants.

381. Defendant denies the allegations contained in paragraph 381 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 381 of the Complaint with respect to the other named co-defendants.

382. Defendant denies the allegations contained in paragraph 382 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 382 of the Complaint with respect to the other named co-defendants.

**ANSWERING FIFTH CAUSE OF ACTION**

383. Defendant repeats and incorporates by this reference its responses to paragraphs 1 through 382 of the Complaint as if fully set forth herein.

384. Defendant denies the allegations contained in paragraph 384 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 384 of the Complaint with respect to the other named co-defendants.

385. Defendant denies the allegations contained in paragraph 385 of the Complaint directed toward Defendant, and denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 385 of the Complaint with respect to the other named co-defendants.

**ANSWERING PRAYER FOR RELIEF**

Defendant denies that Plaintiff is entitled to any of the relief sought in paragraphs 1 through 9 of its Prayer for Relief.

**AFFIRMATIVE DEFENSES**

Defendant sets forth the following affirmative defenses to the claims made in the Complaint. In doing so, Defendant does not assume the burden of proof with respect to any of the affirmative defenses where the substantive law provides otherwise.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part based on the doctrine of fair use.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

The Complaint fails to state a claim upon which relief may be granted.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

To the extent, if any, Plaintiff holds valid trademarks, said trademarks are not infringed.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part due to Plaintiff's failure to mitigate damages.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by waiver, as Plaintiff has previously allowed the use.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

Defendant is not subject to the personal jurisdiction of this Court.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's alleged trademarks are invalid and unenforceable, at least because they are geographically descriptive and have not acquired secondary meaning.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

Defendants allege that venue is improper in the United State District Court for the Southern District of New York.

**AS AND FOR AN NINTH AFFIRMATIVE DEFENSE**

There is no confusion among consumers.

**AS AND FOR AN TENTH AFFIRMATIVE DEFENSE**

Plaintiff does not own a federal trademark registration for the alleged LOWER EAST SIDE trademark and lacks standing to bring a claim for infringement of the mark under 15 U.S.C. § 1114.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's trademarks are generic and/or lack necessary distinctiveness to legally function as source identifiers under applicable United States law.

**AS AND FOR AN TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff has abandoned his alleged trademarks.

**AS AND FOR AN THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has been using and is attempting to further use his alleged trademarks in violation of antitrust laws, *inter alia*, by seeking an improper and unconstitutional monopoly on the use of the phrases "lower east side" and "LES NYC."

**AS AND FOR AN FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims against Defendant are barred in whole or in part by one or more of the equitable doctrines of laches, estoppel, waiver, or unclean hands.

**AS AND FOR AN FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of preemption.

**AS AND FOR AN SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred by the Digital Millennium Copyright Act.

**AS AND FOR AN SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiff cannot establish actual economic harm.



**AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE**

To the extent that Plaintiff suffered any damage or injury, which Defendant expressly denies, Plaintiff failed to take necessary steps to mitigate the damage or injury sustained.

**AS AND FOR AN NINETEENTH AFFIRMATIVE DEFENSE**

Defendant did not have knowledge of the allegedly infringing goods and promptly removed said goods within 24 hours of receiving Plaintiff's Notice of Infringement. *See* Ex. A. Defendant therefore cannot be liable for trademark infringement pursuant to the holding in *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

**AS AND FOR AN TWENTIETH AFFIRMATIVE DEFENSE**

Defendant cannot be liable for monetary damages under the Lanham Act because Defendant is, at most, an innocent infringer.

**AS AND FOR AN TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims for injunction relief have been obviated by Defendant's prompt remedial measures.

**AS AND FOR AN TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the Communications Decency Act.

**RESERVATION OF RIGHTS**

To the extent that Defendant may have other separate and/or additional defenses of which it is not presently aware, Defendant reserves the right to assert them by amendment to this Answer as discovery continues.

**WHEREFORE**, Defendant requests that judgment be entered in its favor dismissing all causes of action set forth in the Complaint with prejudice; that Defendant be awarded all costs,

including attorney's fees, resulting from the action; and for such other and further relief as the Court deems just and proper.

### **COUNTERCLAIMS**

1. These counterclaims are filed pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq. (the "Declaratory Judgment Act"), the Copyright Act, 17 U.S.C. §§ 101, et seq. (the "Copyright Act"), the Lanham Act, 15 U.S.C. §§ 1051, et seq. (the "Lanham Act"), and Federal Rule of Civil Procedure 57.

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), and 2201(a), as this action arises under the laws of the United States, the Declaratory Judgment Act, the Copyright Act, and the Lanham Act.

### **FACTS RELEVANT TO ALL COUNTERCLAIMS**

3. Counter-Plaintiff hosts an online marketplace at [www.bonanza.com](http://www.bonanza.com) (the "website").

4. As stated in the Terms of Use available on the website, Counter-Plaintiff "is not a traditional 'retailer.'" *See* Terms of Use, annexed hereto as Exhibit B.

5. Counter-Plaintiff acts as a venue to match buyers and sellers, but Counter-Plaintiff is not involved in the actual transaction between buyers and sellers and does not transfer legal ownership of items from the sellers to buyers.

6. Counter-Plaintiff has no control over the items advertised, or the ability of sellers to sell items, or the ability of buyers to pay for items.

7. Counter-Plaintiff maintains a "Copyright and Intellectual Property Policy," which is publically available on the website. *See* Copyright and Intellectual Property Policy, annexed hereto as Exhibit C.

8. Counter-Plaintiff's Copyright and Intellectual Property Policy designates an agent to receive notifications of claimed intellectual property infringement, and advises users and third parties that "Once a Proper Bona Fide Infringement Notification is received by the Designated Agent, [Counter-Plaintiff] may remove or disable access to the material infringing upon the intellectual property." *Id.*

9. Counter-Plaintiff also maintains a list of prohibited items, which is publically available on the website, and which identifies "Material that infringes Copyright and Intellectual Property" as prohibited on the website. *See* "What items are prohibited?" Notice, annexed hereto as Exhibit D.

10. In conformity with Counter-Plaintiff's Copyright and Intellectual Property Policy, Counter-Defendant ROBERT G. LOPEZ submitted an Infringement Notice to Counter-Plaintiff on February 22, 2018 at 8:40pm. *See* Exhibit A.

11. Upon information and belief, Counter-Defendant's Infringement Notice related to all of the allegedly infringing goods identified in Counter-Defendant's Fourth Amended Complaint, dated July 6, 2018.

12. Counter-Plaintiff responded to the Infringement Notice on February 23, 2018 at 6:32am. *See* Exhibit A.

13. Counter-Plaintiff removed all of allegedly infringing goods from the website by February 23, 2018 at 11:24am. *See id.*

14. Nevertheless, Counter-Defendant filed his Third Amended Complaint naming Counter-Plaintiff on February 23, 2018—less than 24 hours after sending his Infringement Notice and subsequent to Counter-Plaintiff's response and removal of the allegedly infringing goods.

**FIRST COUNTERCLAIM**

**DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF TRADEMARKS**

15. Counter-Plaintiff restates and realleges paragraphs 1 through 14 of the Counterclaims inclusive, as if fully set forth herein

16. Counter-Defendant's Third and Fourth Amended Complaints clearly and repeatedly allege, *inter alia*, that Counter-Plaintiff "failed to act expeditiously in removing the infringing content as requested by Plaintiff," and that this alleged inaction constitutes an infringement of Counter-Defendant's claimed trademark rights.

17. Infringement of a registered trademark is actionable under the Lanham Act, 15 U.S.C. § 1114(1), which permits a registrant to commence a civil action in U.S. District Court to obtain, *inter alia*, injunctive relief to prevent violation of any such rights, 15 U.S.C. § 1116; and monetary relief including profits attributable to the infringement, *Id.* at § 1117.

18. Counter-Defendant's allegations constitute a clear, unambiguous claim that Counter-Plaintiff's alleged inaction is an infringement of Counter-Defendant's claimed trademark and common law rights, and that Counter-Plaintiff must meet Counter-Defendant's demands or be faced with continued litigation.

19. Counter-Plaintiff has denied liability for trademark infringement.

20. Specifically, Counter-Plaintiff maintains that it did not have knowledge of the allegedly infringing goods and promptly removed said goods within 24 hours after receiving Plaintiff's Notice of Infringement, thereby precluding a finding of liability pursuant to the holding in *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

21. The unreasonable demands of Counter-Defendant are intended to disrupt Counter-Plaintiff's lawful business, thereby requiring an adjudication of the rights of the parties in the dispute identified herein, before Counter-Plaintiff suffers further damage.

22. An actual case or controversy therefore exists within the Court's jurisdiction, concerning the validity of Counter-Defendant's claimed trademark rights, and the respective rights of the parties. *See* 28 U.S.C. §§ 2201, 2202; Fed. R. Civ. P. 57.

23. Counter-Plaintiff has no adequate remedy at law and therefore seeks declaratory relief determining that Counter-Plaintiff's alleged actions do not constitute trademark infringement.

## **SECOND COUNTERCLAIM**

### **DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF COPYRIGHTS**

24. Counter-Plaintiff restates and realleges paragraphs 1 through 23 of the Counterclaims inclusive, as if fully set forth herein.

25. Section 512 of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512, provides a safe harbor for online service providers, such as Counter-Plaintiff, from monetary liability based on, *inter alia*, "information residing on systems or networks at [the] direction of users." 17 U.S.C. § 512(c). 17 U.S.C. § 512(c).

26. Counter-Plaintiff is a qualifying online service provider under the DMCA.

27. To qualify for the Section 512(c) safe harbor, an online service provider (i) must not have "actual knowledge that the material or an activity using the material on the system or network is infringing"; (ii) must not be "aware of facts or circumstances from which infringing activity is apparent"; and (iii) "upon obtaining such knowledge or awareness, [must] act[] expeditiously to remove, or disable access to, the material." 17 U.S.C. § 512(c)(1)(A)(i)-(iii).

28. Counter-Plaintiff did not have actual knowledge of the allegedly infringing goods that Counter-Defendant claims were present on the website.

29. Counter-Plaintiff was not aware of facts or circumstances from which allegedly infringing activity on the website was apparent to Counter-Plaintiff.

30. Upon notice of the allegedly infringing goods, Counter-Plaintiff acted expeditiously to remove allegedly infringing goods from the website, and ultimately removed said goods in less than 24 hours. *See* Exhibit A.

31. Moreover, on April 3, 2018, Counter-Plaintiff even invited Counter-Defendant to join its Brand Protection Program, which offers free services allowing Counter-Defendant to “remove infringing items instantly, without [Counter-Plaintiff’s] intervention.” *See* April Correspondence, annexed hereto as Exhibit E.

32. Counter-Defendant never responded to Counter-Plaintiff’s invitation to join the Brand Protection Program.

33. Counter-Plaintiff did not receive a financial benefit directly attributable to any infringing activity.

34. For all these reasons, Counter-Plaintiff is entitled to DMCA immunity and, accordingly, “shall not be liable for monetary relief.” 17 U.S.C. § 512(c)(1).

35. Despite the foregoing, Counter-Defendant’s Third and Fourth Amended Complaints clearly and repeatedly allege, *inter alia*, that Counter-Plaintiff “failed to act expeditiously in removing the infringing content as requested by Plaintiff,” and that this alleged inaction constitutes an infringement of Counter-Defendant’s claimed copyrights.

36. Infringement of a copyright is actionable under the Copyright Act, 17 U.S.C. § 501, which permits a copyright holder to commence a civil action in U.S. District Court to

obtain, *inter alia*, injunctive relief to prevent violation of any such rights, 17 U.S.C. § 502; and monetary relief including profits attributable to the infringement, 17 U.S.C. § 504, as well as a potential award of cost and attorney's fees, 17 U.S.C. § 505.

37. Counter-Defendant's allegations constitute a clear, unambiguous claim that Counter-Plaintiff's alleged actions are an infringement of Counter-Defendant's claimed copyright rights, and that Counter-Plaintiff must meet Counter-Defendant's demands or be faced with continued litigation.

38. As set forth herein, Counter-Plaintiff has denied liability for copyright infringement.

39. The unreasonable demands of Counter-Defendant are intended to disrupt Counter-Plaintiff's lawful business, thereby requiring an adjudication of the rights of the parties in the dispute identified herein, before Counter-Plaintiff suffers further damage.

40. An actual case or controversy therefore exists within the Court's jurisdiction, concerning the validity of Counter-Defendant's claimed copyright rights, and the respective rights of the parties. *See* 28 U.S.C. §§ 2201, 2202; Fed. R. Civ. P. 57.

41. Counter-Plaintiff has no adequate remedy at law and therefore seeks declaratory relief determining that Counter-Plaintiff is entitled to DMCA immunity and that Counter-Plaintiff's alleged actions do not constitute copyright infringement.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Counter-Plaintiff requests relief as follows:

- A. Enter judgment in Counter-Plaintiff's favor and against Counter-Defendant on all counts raised;
- B. Declare that Counter-Plaintiff is entitled to DMCA immunity and that Counter-Plaintiff's alleged actions do not constitute copyright infringement;
- C. Declare that Counter-Plaintiff's alleged actions do not constitute trademark infringement;
- D. Declare that this is an "exceptional case" and award of Counter-Plaintiff's attorneys' fees and costs under 15 U.S.C. § 1117;
- E. Declare that Counter-Plaintiff is the prevailing party and award Counter-Plaintiff its attorneys' fees and costs of suit herein incurred pursuant to the Copyright Act, 17 U.S.C. § 505;
- F. Award Counter-Plaintiff all prejudgment and postjudgment interest allowed by law; and,
- G. Grant Counter-Plaintiff such other and further relief as this Court shall deem necessary and appropriate.

**JURY DEMAND**

Counter-Plaintiff/Defendant demands a trial by jury of all causes of action as to which the law entitles it to a trial by jury.

Dated: New York, New York  
July 20, 2018



Respectfully submitted,

**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

/s/ Jura Zibas

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*Defendant BONANZA.COM, INC.*